Supreme Court, U. S.
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No. 75-1186

In the Supreme Court of the United States

OCTOBER TERM, 1975

MORRIS S. BROMBERG, PETITIONER

v.

ROBERT E. HAMPTON, CHAIRMAN OF THE CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On February 25, 1972, petitioner applied to the United States Civil Service Commission for appointment to the position of Hearing Examiner (now Administrative Law Judge). At the time of his application, petitioner was an Assistant Attorney General for the State of Illinois. The Commission notified petitioner, by letter dated June 12, 1972, that his qualifications did not satisfy the Commission's requirements and that his application therefore had been denied. Petitioner appealed to the Board of Appeals of the Civil Service Commission, which affirmed the decision not to appoint petitioner to the position of Hearing Examiner.

Petitioner thereupon brought suit in the United States District Court for the Northern District of Illinois, princi-

pally under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended and added, 42 U.S.C. 2000e *et seq.*,[1] alleging that in selecting Hearing Examiners the Commission unlawfully preferred attorneys with federal experience over attorneys without federal experience and discriminated against applicants over the age of 60. The district court held that Title VII did not afford a jurisdictional basis for petitioner's suit because he had not alleged that the Commission had discriminated against him on the basis of race, color, religion, sex or national origin (Pet. App. B12). The district court held, however, that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, conferred jurisdiction over the suit and the court therefore proceeded to consider the merits of petitioner's complaint. After having held a trial *de novo,* the court found that the Commission had not unlawfully discriminated against petitioner or acted arbitrarily or capriciously in denying his application (Pet. App. B13-B16). The court of appeals affirmed (Pet. App. A1-A5).

This case does not warrant further review. Title VII of the Civil Rights Act of 1964 applies only to discrimination on account of "race, color, religion, sex, or national origin." Section 717, as added, 86 Stat. 111, 42 U.S.C. (Supp. IV) 2000e-16(a). "Discrimination" against attorneys having no federal experience is not prohibited by Title VII.[2] Even if it is assumed that the district court had jurisdiction

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[1]Petitioner also alleged jurisdiction under 28 U.S.C. 1331, 1337, 1343, 1346, 1361, 1391, and 2201, and also under 5 U.S.C. 552(a)(3) and 702.

[2]Petitioner apparently has abandoned his claim of age discrimination in this Court. In any event, the district court correctly found that petitioner had not made a *prima facie* showing that the Commission had discriminated against him on account of his age (Pet. App. B9).

under the Administrative Procedure Act,[3] the courts below were clearly correct in holding that it was not arbitrary, capricious or an abuse of discretion for the Commission to have concluded that petitioner's duties as an Assistant Attorney General of the State of Illinois had not been sufficiently diversified or complex to qualify him to perform the duties of a federal Hearing Examiner. As the district court pointed out (Pet. App. B4), petitioner's experience had consisted, for the most part, of practice before the Circuit Court of Cook County and had almost exclusively involved state revenue matters.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]But see *Mathews* v. *Sanders*, No. 75-1443, petition for a writ of certiorari filed April 9, 1976.

[4]Petitioner incorrectly contends (Pet. 7) that this case "presents substantially the same questions of law" as *Washington* v. *Davis*, No. 74-1492, argued March 1, 1976. *Davis* involves allegations of racial discrimination. No such allegations have been made here. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

Neither does this case involve a *prima facie* showing of class discrimination on any other basis. See cases cited at pages 10 through 13 of the petition. As the district court noted (Pet. App. B5), petitioner failed to present valid figures showing that the Commission discriminates against any class of persons in selecting Hearing Examiners and there is thus no occasion "to decide [here] whether a valid reason exists for the discrimination, [or] to decide whether the discrimination is prohibited by a federal law or regulation."

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